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May 27, 2005

EX PARTE

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25

July 1, 2005 Annual Access Charge Tariff Filings, WCB/Pricing 05-22

Dear Ms. Dortch:

On May 10, 2005, the eCommerce & Telecommunications User Group and the Telecommunications Committee of the American Petroleum Institute (collectively referred to as "eTUG") filed an *ex parte* letter in which they urged the Commission to adopt on an interim basis an X-factor of 5.3 percent, effective July 1, 2005.[1] Comptel/ALTS, Global Crossing, and AT&T have filed in support of this request.[2] However, eTUG's request is both legally and procedurally improper and must be rejected.

eTUG's request is inherently inconsistent with the Administrative Procedure Act ("APA"). The premise of eTUG's request is that, since the comment cycle in this proceeding will not be completed by June 30, 2005, the Commission should act before all comments are received and impose an interim X-factor to take effect July 1, 2005. eTUG claims that this proposal meets the requirements of the APA because the Notice of Proposed Rulemaking ("NPRM") issued in this proceeding provides a "reasonable opportunity to participate in the

[1] Ex Parte Letter from Brian R. Moir, Counsel for eTUG, and C. Douglas Jarrett, Counsel for API, to Marlene Dortch, Secretary, FCC (May 10, 2005) ("*eTUG Ex Parte*").

[2] See Ex Parte Letter from Michael H. Pryor, Counsel for Comptel/ALTS, to Marlene H. Dortch, Secretary, FCC (May 13, 2005); Ex Parte Letter from Paul Kouroupas, Vice President & Senior Counsel, Global Crossing, to Marlene H. Dortch, Secretary, FCC (May 24, 2005); Ex Parte Letter from Robert W. Quinn, Jr.. AT&T Vice President, to Marlene Dortch, Secretary, FCC (May 26, 2005).

rulemaking process."[3] Thus, under eTUG's novel interpretation of the APA, a party has a "reasonable opportunity" to participate in the making of an interim rule if it is allowed to comment *after* the rule becomes effective. However, the law is clearly otherwise.[4]

As a general rule, the APA requires agencies to adhere to three requirements when promulgating rules: (1) issue notice of the proposed rule; (2) provide the public with an adequate opportunity to comment on the proposed rule; and (3) provide an explanation of the rule ultimately adopted.[5] These requirements are intended to ensure that "'legislative functions of administrative agencies shall so far as possible be exercised only upon public participation.'"[6]

Contrary to eTUG's position, the opportunity for comment requirement necessarily entails giving parties the opportunity to submit information that the Commission could actually consider *before* it makes a decision. This is clear from the plain language of the pertinent section of the APA, which explicitly requires an opportunity for parties to participate *before* the Commission renders a decision:

> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. *After consideration of the relevant matter presented*, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.[7]

The rule is clear: first parties participate, and then the Commission acts based on the information submitted through such participation. Indeed, the Commission would violate the APA if it were to act, even on an interim basis, without first allowing parties the opportunity to comment, as eTUG has requested.[8]

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[3] *eTUG Ex Parte* at 3.

[4] *See, e.g., Texas Food Indus. Ass'n v. United States Dep't of Agric.*, 842 F. Supp. 254 (W.D. Tex. 1993) (declining to accept argument that an agency's failure to provide notice and comment before promulgating a new rule is "cured" by the agency's acceptance of comments after the rule took effect because it "would lead in the long run to depriving parties affected by agency action of any way to enforce their [APA] rights to pre-promulgation notice and comment") (quoting *United States Steel Corp. v. EPA,* 595 F.2d 207, 214 (5th Cir. 1979)).

[5] *See* 5 U.S.C. §§ 553(b)-(c) (1988).

[6] *San Diego Air Sports Center v. FAA*, 887 F.2d 966, 969 (9th Cir. 1989) (quoting S. Doc. No. 248, 79th Cong., 2d Sess. 257 (1946)).

[7] 5 U.S.C. § 533(c) (emphasis added).

[8] *See, e.g., Texas Food Indus. Ass'n*, 842 F. Supp. 254 (plaintiffs were entitled to a preliminary injunction to prohibit application of an interim final rule issued without public comment); *Philadelphia Citizens in Action v. Schweiker*, 527 F. Supp. 182 (E.D. Pa. 1981) (granting declaratory judgment and permanent injunction invalidating portions of federal regulations adopted without public comment); *American Academy of Pediatrics v. Heckler*, 561 F. Supp. 395 (D.D.C. 1983) (invalidating interim regulation adopted without public comment).

eTUG erroneously suggests that the Commission can avoid the requirements of the APA "in view of the added deference the Commission receives when fashioning interim relief."[9] However, *CompTel v. FCC*, 117 F.3d 1068 (8th Cir. 1997), which is cited by eTUG, is inapposite. In *CompTel* the court rejected a challenge to an interim decision by the Commission to establish "a temporary transitional mechanism" for the collection of the carrier common line charge (CCLC) and the transport interconnection charge (TIC) by incumbent LECs. However, the Commission's interim rule was established after notice and opportunity for comment, unlike the interim relief eTUG is seeking here.

Furthermore, eTUG misconstrues the purpose of interim rules, which generally is to preserve the status quo while an agency completes a permanent rulemaking proceeding. For example, in *MCI Telecommunications Corp v. FCC*, 750 F.2d 1135 (D.C. Cir. 1984), which also is cited by eTUG, the D.C. Circuit Court of Appeals upheld the Commission's interim decision on a jurisdictional separations issue. However, that decision was adopted after notice and opportunity for comment and, of particular importance to the court of appeals, the Commission's interim decision was necessary to preserve the status quo. According to the court, "substantial deference must be accorded an agency when it acts to maintain the status quo so that the objectives of a pending rulemaking proceeding will not be frustrated."[10]

In this case, no action is necessary to preserve the status quo. In fact, eTUG and its supporters do not want to preserve the status quo pending completion of this rulemaking proceeding. Instead, they seek to disrupt the status quo. Further, they request that this action be taken on an inadequate record, *before* the parties have an opportunity to participate in the process – a request that is legally flawed.[11]

Equally flawed is eTUG's assertion that the current special access rates (which eTUG labels as "excessive") should not remain in effect because this would be contrary to the intention of the Commission at the time the CALLS plan was implemented. In this regard, eTUG states that "the Commission never intended the special access X-Factor to remain equal to GDP-PI

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[9] *eTUG Ex Parte* at 3.

[10] 750 F.2d at 1138.

[11] eTUG cites *Forester v. Consumer Product Safety Commission*, 559 F.2d 774 (D.C. Cir. 1977), for the proposition that the "APA requires only a 'reasonable opportunity to participate in the rulemaking process.'" *eTUG Ex Parte* at 3. However, that is not what the case says. In *Forester* the plaintiffs argued that an agency violated the APA by adopting regulations that affected all bicycles when the notice reflected that the proposed rules were only intended for children's bicycles. In rejecting this argument, the court noted that the APA "does not require that interested parties be provided precise notice of each aspect of the regulations eventually adopted. Rather, *notice is sufficient if it affords interested parties* a reasonable opportunity to participate in the rulemaking process." *Id.* at 787 (emphasis added). Here, the issue is not notice; rather the issue is whether an agency can adopt interim regulations without an opportunity for comment, which was not an issue addressed by the *Forester* court. In fact, the regulations at issue in *Forester* were only adopted after three different rounds of public comment and numerous public meetings that took place over the course of two years, which more than satisfied the APA's "opportunity for comment" requirement.

after the CALLS plan expired. Rather the Commission explained that 'the compromise advocated by CALLS will provide a solution to the contentious x-factor proceeding *for the term of the CALLS proposal.*'"[12]

eTUG, however, carefully avoids any reference to the Commission's real intent as to what should occur at the expiration of the CALLS plan. Specifically, the Commission stated the following in the CALLS Order:

> The CALLS Proposal is not designed as a permanent solution to all of the issues it addresses; instead, it is a transitional plan that moves the marketplace closer to economically rational competition, and it will enable us, once such competition develops, to adjust our rules in light of relevant market developments. Consequently, as the term of the CALLS Proposal nears its end, we envision that the Commission will conduct a proceeding to determine whether and to what degree it can deregulate price cap LECs to reflect the existence of competition.[13]

Thus, the Commission was clear that it intended to move forward as soon as possible after the expiration of CALLS to consider the appropriateness of additional deregulatory mechanisms depending upon the state of competition. BellSouth submits that this is precisely what the Commission should do in the context of the NPRM. eTUG's contrary implication that the Commission intended, once the CALLS plan expired, to return to a restrictive form of price cap regulation and to impose a productivity factor consistent with that regime is simply false.

Furthermore, the Commission contemplated the possibility that it would be unable to complete its proceeding prior to the expiration of CALLS. As the Commission noted in the NPRM, "The CALLS plan was intended to run until June 30, 2005, *but will continue after this date until the Commission adopts a subsequent plan.*"[14] Because the CALLS plan is expected to remain in place until a new plan is adopted, there is no need for the Commission to adopt interim rules prior to July 1, 2005 or to "postpone the date of the annual access filing," notwithstanding eTUG's claims to the contrary.

eTUG also ignores that the current record in this proceeding does not support the imposition of X-factor of 5.3 percent, even on an interim basis. eTUG cites to the portion of the NPRM which states that "this record contains substantial evidence suggesting that productivity has increased and continues to increase in the provision of access services."[15] This portion of the NPRM, however, cites as support an earlier section from the NPRM (Section III.A.1), which

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[12] *eTUG Ex Parte* at 3 (quoting *Access Charge Reform, et al.,* CC Docket Nos. 96-262 *et al.,* Sixth Report and Order, 15 FCC Rcd 12962 (2000) ("*CALLS Order*"), ¶ 160).

[13] *CALLS Order* ¶ 36 (citations omitted).

[14] NPRM ¶ 3 (emphasis added).

[15] *eTUG Ex Parte* at 2, quoting NPRM ¶ 131.

consists largely of an analysis of ARMIS data. The ARMIS data is described as suggesting certain conclusions about "the relationship between demand growth and growth in expenses and investment" in the special access service market. The NPRM also acknowledges, however, that the ARMIS data has been criticized by some parties as meaningless. The NPRM invites "parties to comment on the relevance of these data and the relationship between demand growth and growth in expenses and investment in the special access market." Further, the NPRM invites parties to make adjustments to ARMIS to take into consideration the cost allocation issues referenced in this same paragraph.[16]

Thus, what the NPRM actually contains is: (i) at most a very tentative conclusion on the basis of data that has been criticized; and (ii) a request for parties to comment on whether this proposed limited usage of ARMIS data is valid (and, if so, what adjustments to this data are needed). In short, the record does not support the interim relief eTUG seeks, even assuming eTUG's request were procedurally proper, which is not the case. In addition, as demonstrated above, the expiration of CALLS does not create any urgency necessitating the Commission to act. The Commission has ample time to develop a complete and a current record before it takes any action. It makes no sense to respond in a knee jerk fashion to a single issue when the Commission already has a comprehensive proceeding underway to address the multitude of issues surrounding special access pricing.

Please include a copy of this letter in the record in the above-referenced proceedings. Thank you for your attention to this matter.

Sincerely,

Bennett L. Ross

BLR:kjw
#585601

cc: Michele Carey
Tom Navin
Lisa Gelb
Tamara Preiss

[16] NPRM, ¶ 29.